United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4165

In The

United States Court of Appeals

For The Second Circuit

MAURICE GERSHMAN d/b/a QUEENS-NASSAU NURSING HOME,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CYCLE CLEANING CORP.,

Respondent.

On Appeal from the National Labor Relations Board

REPLY BRIEF FOR PETITIONER, MAURICE GERSHMAN d/b/a QUEENS-NASSAU NURSING HOME

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Respondent. :

- -x

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REPLY BRIEF FOR PETITIONER,
MAURICE GERSHMAN d/b/a
QUEENS-NASSAU NURSING HOME

PRELIMINARY STATEMENT

In Petitioner's main brief, by meticulous reference to the transcript, we have endeavored to place the testimony in its proper context to demonstrate that such incidental supervision as the Nursing Home may have exercised over Cycle's employees fails to justify imposition upon the Nursing Home of the legal obligations attendant upon a finding of a Joint-Employer relationship. Of even greater significance is that the Respondent has failed to seriously challenge the Petitioner's contention that the record on appeal, including the Administrative Law Judge's "Findings of Fact" (Joint Appendix, p. 10) and "Conclusions of Law" (Joint Appendix, p. 19), fails to establish the affirmative participation of the Petitioner in any of the acts supporting findings of violations of Sections 8(a)(2) or (3) of the Act, or that the Petitioner condoned or ratified such acts. We summarize below the position of the parties, and that of the Administrative Law Judge.

I. Section 8(a)(2).

The Administrative Law Judge found (Joint Appendix, p. 16):

> "In my opinion Watkins' attendance at and participation in the Local 144 meeting of the employees, particularly in the view of Watkins' statement to Wilkinson that the employees 'automatically' belonged to Local 144, was a clear signal to the employees that management approved of and was backing 144 as the employees' bargaining representative and constituted illegal assistance to Local 144 in violation of Section 8(a)(2). I so find. 8/ I also find that this conduct is sufficient to require that the election in Case 29-RC-2659 be set aside."

> "8/ There was disputed evidence offered to show disparate treatment by Respondents of Local 1115 representatives in connection with the granting of access to the Homes premises. Since such conduct if found could only serve to accentuate an already clear cut violation of Section 8(a)(2) I deem it unnecessary to dispose of it."

Further, Respondent, in its brief (at p. 5) summarizes the acts constituting "The assistance given to Local 144 during the campaign by the Home and Cycle," as follows: (1) Local 144 representatives were often at the

Home; (2) Cycle and the Home were aware of this; (3) Cycle supervisor Watkins told Cycle employee Wilkinson that he automatically belonged to 144; (4) a poster concerning an off-premises meeting by Local 144 hung for a time in the Home's dining room; (5) Cycle supervisor Watkins gave Cycle employee Wilkinson permission to attend such meeting; (6) Local 144 representatives attended the off-premises meeting; (7) and a Local 144 representative stated that Cycle supervisor Watkins would explain to Cycle employees "because Cycle was entirely different than the Home."

It is immediately apparent that not one of the foregoing allegations involves participation by the Nursing Home in the alleged Section 8(a)(2) violation. The Nursing Home does not dispute the presence of Local 144 representatives on its premises. In fact, it stipulated this fact (Joint Appendix, p. 192). The Respondent's purpose in introducing testimony of this nature, however, was to "Show a practice of how some people are allowed free access to the home and other people aren't." (Joint Appendix, p. 98.) This fact, however, was never established.

The Administrative Law Judge not only specifically stated that he "deemed it unnecessary to dispose of it" (Joint Appendix, p. 16, footnote "8"), but he made the following affirmative findings which conclusively dispel any question that the Nursing Home accorded disparate treatment to other unions in relation to that accorded Local 144. He stated (Joint Appendix, p. 15) as follows:

> "Daisy McQueen testified about seeing Goodman in early June on the third floor handing out leaflets. McQueen had been backing another union, a Local 1199, and her active solicitation for it on all five floors and in the dining room was known to management but not prohibited or interfered with in any way. In addition to Local 144, Local 1115 and the Union being backed by McQueen, another union a Local 4 of the Teamsters was also interested in the Home and its representatives seen by McNab in the Home several times handing out literature. *** McNab even signed one of their cards."

The established simple truth is that the Nursing Home consistently applied a "hands off" policy with respect to organizing activities by any interested union.

Finally, the statements made by a Cycle

supervisor to Cycle employees during an off-premises meeting are not binding upon, and cannot be attributed to, the Nursing Home. If, indeed, as the Administrative Law Judge stated, that Cycle supervisor Watkins' statement to Cycle porter Wilkinson that "the employees 'automatically' belonged to Local 144, was a clear signal to the employees that management approved of and was backing Local 144" (Joint Appendix, p. 16, line 14), such statement cannot be attributed to the Nursing Home. No representative of the Nursing Home attended the off-premises meeting and, hence, there was neither an affirmative ratification of such statement nor acquiescence in it. There is in fact no evidence that the Nursing Home was ever aware of such statement prior to the Labor Board hearing.

By reason of the foregoing, it is respectfully submitted that there is not a scintilla of credible evidence to support a charge that the Nursing Home lent illegal assistance to Local 144 in violation of Section 8(a)(2) of the Act.

II. Section 8(a)(3).

In discussing the alleged discriminatory

discharge of Ortiz, the Administrative Law Judge first reviews the testimony that supports the contention that Ortiz was discharged for cause. The Administrative Law Judge then failed to pass upon this contention because of his apparent conviction that, even if the discharge was justified, the amazingly candid testimony of Cycle's supervisor Watkins that once any union got in it was difficult to get rid of employees with even a poor record, was an example of discrimination of such a high order that it overrode any other consideration. As the Administrative Law Judge stated (Joint Appendix, p. 19, line 29): "A better example of how to discourage union membership can hardly be imagined than the discharge of employees because of their anticipated selection of a union to represent them. I find that the discharge of Ortiz involved such discrimination and thus violated Section 8(a)(3) of the Act."*

---

* Cycle has not appealed from the alleged discriminatory discharge of Ortiz. Petitioner, because it had absolutely no role in the discharge of Ortiz, has appealed solely on the question of Joint Employer relationship. We note in passing, however, our contention that if a discharge for cause is supported by the facts, secondary considerations of Union animus are irrelevant. As the Court of Appeals for the Fourth Circuit held in NLRB v. Consol. Diesel Electric Co., 469 F.2d 1016 (1972): "When a cause other than union activity exists for the discharge, illegal motive cannot be based merely on the discharged employee's union organizational activity." Also, NLRB v. Neuhoff Bros. Packers 398 F2d 640 (5th Cir. 1968); NLRB v. United Brass Works, 287 F.2d 689 (4th Cir. 1961).

It is apparent from the foregoing, as well as the record as a whole, that the Nursing Home was neither directly nor indirectly involved in the discharge of Ortiz. In fact, it is clear that the Nursing Home tried to save Ortiz's job. As the Administrative Law Judge found (Joint Appendix, p. 18, line 26): "Lebowitz (the Nursing Home's administrator) told Ortiz that Watkins was going to 'get rid' of him if he did not improve and that he was asking Watkins to give him another chance." (Parenthetical phrase and emphasis supplied.)

The Respondent's brief contains no allegation to the contrary, except for an unsubstantiated contention that Lebowitz was fully aware of Ortiz's union sympathies, but even if the fact of such awareness were established, it is obvious that it did not motivate Lebowitz to act against Ortiz's interests. Respondent states (Brief, p. 15):

> "As to the discriminatory discharge of Ortiz, although it was Cycle's supervisor Watkins who actually fired him, Nursing Home Administrator Lebowitz was fully aware of Ortiz's union sympathies as well as of Cycle's alleged dissatisfaction with Ortiz's work performance. In fact at Lebowitz's suggestion both he and Watkins spoke with Ortiz about the necessity for

improvement in Ortiz's attendance record. Thus, the Home's citation of Lummus Co. v. N.L.R.B., 339 F.2d 728 (C.A.D.C., 1964) is entirely inapposite, since the employer literally did not participate in the unfair labor practices nor did he have knowledge of them."

By reason of the foregoing, it is respectfully submitted that it is uncontradicted in the record that the Nursing Home literally did not participate in the unfair labor practice and, although it had knowledge of the proposed discharge founded on the employee's poor work record, its intervention on behalf of the employee was unavailing.

ARGUMENT

I

(A) ISOLATED INSTANCES OF DE FACTO CONTROL BY PETITIONER OVER CYCLE'S EMPLOYEES CANNOT BE ELEVATED TO THE LEVEL OF CONTROL SUFFICIENT TO SUPPORT A FINDING OF A "JOINT EMPLOYER" RELATIONSHIP

(B) STATUTORY CULPABILITY SHOULD NOT BE ATTRIBUTED TO THE PETITIONER WHERE THE RECORD CONCLUSIVELY ESTABLISHES THAT IT WAS NOT AWARE OF, AND DID NOT PARTICIPATE IN OR CONDONE, THE PURPORTED UNLAWFUL ACTION OF CYCLE WHICH FORMED THE BASIS FOR AN UNFAIR LABOR PRACTICE CHARGE UNDER SECTION 8(a)(3) OF THE ACT.

The firing of Ortiz, an employee of Cycle, by a Cycle supervisor, was not by itself an act which should have alerted the Petitioner to its purported unlawful nature. Petitioner was apprised of Ortiz's bad work record and endeavored to intervene on behalf of Ortiz in an attempt to save his job. It was only at the Labor Board hearing in the instant matter that Watkins, the supervisor who fired Ortiz, made a statement concerning her personal convictions regarding Union membership. "Some of the Nursing Homes that we had, that we was in charge of," she stated, "had union. I know for a fact that what you put up with, you know, an employee, this is almost like what you are stuck with." (Joint Appendix, p. 374, line 5). The Administrative Law Judge found these two sentences to be of such overwhelming dimensions in describing union animus, that he declared that a "better example of how to discourage union membership can hardly be imagined" (Joint Appendix, p. 19, line 29). Assuming, arguendo, that a mental reservation relating to union animus could serve to void an otherwise justifiable discharge for cause, how may Watkins' mental machinations be attributed to the Petitioner? -- and how may such attribution be countenanced on a retroactive basis? Surely, there is nothing in the record to support a contention that the Petitioner knew

of Watkins' mental processes, insofar as they may have been discriminatory against union members, at the time of Ortiz's discharge.

The third of the Administrative Law Judge's "Conclusions of Law" (Joint Appendix, p. 19), finds that the "Respondent has engaged" in a Section 8(a)(3) violation by discharging Ortiz. Under the caption "The Remedy," however, the Administrative Law Judge switches from the singular form of the noun, "Respondent," to the plural, and states, "Having found that Robert Ortiz was discharged by Respondents***" (Joint Appendix, p. 20, line 15). By this simple expedient, the Administrative Law Judge finds the Petitioner blameless for the allegedly discriminatory discharge of Ortiz, yet subjects the Petitioner to the recommended remedy of reinstating Ortiz to a position he never held with the Petitioner, in a job classification not under the Petitioner's control, with seniority and other rights and privileges never earned with the Petitioner and relating to periods of time far removed from the acts of Cycle complained of herein, together with loss of earnings or other monetary loss (including payroll taxes) for which the Petitioner had never contracted. Perhaps we are our "brother's keeper," but the foregoing circumstances would appear to be an exorbitant price to pay.

It is to be noted that in N.L.R.B. v. Gibralter Industries, Inc. 307 F. 2d 428 (C.A. 4, 1962) cited with approval by Respondent (Brief, p. 11), the mobile home dealer therein involved almost completely controlled the affairs of a mobile home manufacturer to the extent that its employees, from the president down, were deemed to be de facto employees of the manufacturer. The Court of Appeals in that case concurred with the Board's findings that the principal stockholder of the dealer actively participated in the unfair labor practices committed by the manufacturer, "which concededly did occur with (such stockholder's) knowledge, consent and encouragement." (ibid, at p. 430). (Accord: N.L.R.B. v. Dayton Coal & Iron Corp., 208 F. 2d 394, 395 [C.A. 6, 1953]). The facts in Gibralter are inapposite to those of the case at bar.

In ordering remedial back pay pursuant to Section 10(c) of the Act, for an employee discriminatorily discharged within the meaning of Section 8(a)(3) of the Act, the Board is directed to issue a cease and desist order requiring the guilty party to "take such affirmative action, involving reinstatement and back pay, as will effectuate the policies of this subchapter." Culpable conduct, however, should be related to an assessment of guilt or to a course of conduct that inextricably weaves the conduct of one party to that of another. (N.L.R.B. v. United Marine Div., Local 333, Natl. Mar. Union, 417 F. 2d 865 [C.A. 2,

1969]; Union Starch & Refining Co. v. N.L.R.B., 186 F. 2d 1008, 27 ALR 2d 629, cert. den. 342 U.S. 815, 72 S. Ct. 30, 96 L. Ed. 617). As stated in Bon-R Reproductions, Inc. v. N.L.R.B., 309 F. 2d 898, 905 (C.A. 2, 1962):

> "In N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 433, 61 S. Ct. 693, 698, 85 L. Ed. 930 (1941), the Supreme Court said: '[T]he authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.' And in May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 390, 66 S. Ct. 203, 211, 90 L. Ed. 145 (1945), the Court amplified this by saying: 'The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting interstate commerce." See also Communications Workers of America, AFL-CIO v. N.L.R.B., 362 U.S. 479, 80 S. Ct. 838, 4 L. Ed. 2d 896 (1960)(per curiam)."

Since the Act is designed to deter and prevent unfair labor practices as well as to redress past grievances, it necessarily follows that only those parties who are guilty by reason of their direct or indirect participation in the unlawful acts should be held liable therefor. Thus, "one who aids the immediate employer in contravening the statute" is also an "employer" and liable for the unfair labor practice charged (N.L.R.B. v. Taylor-Colquitt Co. et al., 140 F. 2d 92, 93 [C.A. 4, 1943]; N.L.R.B. v. Grower-Shipper Vegetable of Cent. Cal. Ass'n,

122 F. 2d 368, 378 [C.A. 9, 1941]). This principle may also be extended to an employer's ratification of what was originally an unauthorized act of a person under his control (N.L.R.B. v. Mayer, 196 F. 2d 286 [C.A. 5, 1952]). Where contracting out is used as a legalistic machination to subvert the policies of the Act, the Court's have repeatedly imposed liability. Assistance in exposing such a subterfuge is usually found in the significant degree of control retained by the party contracting out. (See, Butler Bros. v. N.L.R.B., 134 F. 2d 981, cert. den. 320 U.S. 789, 64 S. Ct. 203, 88 L. Ed. 475; Wasleff v. N.L.R.B., 320 U.S. 789, 64 S. Ct. 204, 88 L. Ed. 475; and Manley Transfer Co. Inc. v. N.L.R.B., 390 F. 2d 777 [C.A. 8, 1968]).

The Petitioner, however, did not participate in, aid or abet Cycle's supervisor in the discharge of Ortiz; exercised no control over Cycle's supervisor so that her acts may be attributed to the Petitioner; and did not enter into its contract with Cycle in an effort to thwart the purposes of the Act. By reason of the foregoing, it is respectfully submitted that the Administrative Law Judge and the Board erred in holding the Petitioner responsible for the

acts of a Cycle supervisor in discharging Ortiz.

Sections 8(a)(2) and (3) of the Act are remedial in nature, attempting to eliminate advantages one union may have obtained over another because of employer interference, and to eliminate employer discrimination against employees by reason of their union activity. Actual control of culpable activity should be a prerequisite to a finding of a joint employer relationship and, hence, to the commission of an unfair labor practice. N.L.R.B. v. Deaton, Inc., 502 F. 2d 1221 (C.A. 5, 1974); N.L.R.B. v. Sachs, 503 F. 2d 1229 (C.A. 7, 1974); N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F. 2d 1270 (C.A. 4, 1970); N.L.R.B. v. Gibralter Industries, Inc., supra, pg. 430, 431.

Section 8 (a)(5) cases, however, deal with the refusal of the employer to bargain, and the statutory policy of encouraging confrontation across the bargaining table is best served by expanding the concept of "employer" to those who are involved in the implementation of management's labor policies through the exercise of retained control over the employees of another employer. N.L.R.B. v. Checker Cab Co., 367 F. 2d 692, 698 (C.A. 6, 1966), cert.

den. 395 U.S. 1008; N.L.R.B. v. Greyhound Corp. (Southern Greyhound Lines Div.), 368 F. 2d 778 (C.A. 5, 1966); N.L.R.B. v. Dayton Coal & Iron Corp., 208 F. 2d 394 (C.A. 6, 1953); Ace-Alkire Freight Lines, Inc. v. N.L.R.B., 431 F. 2d 280 (C.A. 8, 1970).

Thus, in the Jewell Smokeless and Gibralter Industries cases, relied upon by Respondent (See Respondent's Brief pp. 15-16) for the proposition that "joint employer" status forms the basis of liability for a Section 8(a)(3) violation of the Act, the Section 8(a)(3) violations in those cases was predicated upon said Employer's active participation in, or knowledge, consent, and encouragement of the offending behavior. (Although these cases do not contain specifications of the sections of the Act violated, it becomes apparent from reading the cases which violations were involved.) N.L.R.B. v. Mayer, 196 F. 2d 286 (C.A. 5, 1952); N.L.R.B. v. Sachs, supra. Similarly, the heavy reliance by Respondent upon N.L.R.B. v. Greyhound Corp., supra, is misplaced, because the exercise of sufficient control to justify the finding of a "joint employer" relationship, was utilized to support a violation of Section 8(a)(5) of the Act. (Compare, Charlotte Union Bus Sta., Inc. 135 N.L.R.B. 228, 49 L.R.R.M. 1461.)

II

ABSENT A SHOWING THAT PETITIONER PARTICIPATED IN, AIDED OR ABETTED CYCLE IN FAVORING ONE UNION OVER ANOTHER, OR THEREAFTER RATIFIED SUCH CONDUCT, PETITIONER MAY NOT BE FOUND GUILTY OF A VIOLATION OF SECTION 8(a)(2) OF THE ACT.

It is clear that the Petitioner did not participate in any of the acts either the Administrative Law Judge or the Respondent cite to support a charge that Cycle violated Section 8(a)(2) of the Act (This Brief, pp. 2-8 incl.). The Respondent introduced testimony at the hearing to "show a practice of how some people are allowed free access to the home and other people aren't." (Joint Appendix, p. 98). The Administrative Law Judge did not rule on this issue (Joint Appendix, p. 16, footnote "8"). The mere presence of Local 144 representatives at the Petitioner's Nursing Home, in the absence of a showing that there was any favoritism demonstrated for one union over another, cannot support a Section 8(a)(2) violation. (Shopwell, Inc. 213 N.L.R.B. No. 34, 87 L.R.R.M. 1118 (1974).

The essential question to be asked is whether the affected unions were accorded disparate treatment. In N.L.R.B. v. Brown Co., 160 F. 2d 449, 454 (C.A. 1, 1947), the Court held that an ultimate finding of an unfair labor practice under Sections

8(a)(1) and (2) of the Act is not supported by a subsidiary finding that the Employer permitted one union access to and use of its facilities, where there was no evidence to support a finding that a rival union was not afforded equal privileges. (See also, Wayside Press, Inc. v. N.L.R.B., 206 F. 2d 862 [C.A. 9, 1953]: Stewart-Warner Corp. v. N.L.R.B., 194 F. 2d 207 [C.A. 4, 1952].) The Administrative Law Judge, in fact, detailed how Petitioner let several unions have a free hand in soliciting membership inside its premises (Joint Appendix, p. 15).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Review should be granted, and that the Board's cross application for enforcement should be denied.

Yours, etc.

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A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
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Petititoner,

- against -

NATIONAL LABOR RELATIONS BOARD,
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Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

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That on the 2nd *day of* Febrary *19*76 *, deponent served the annexed*

Reply Brief *upon* 1) Elliott Moore & Laura Ross Blumenfeld
2) Cycle Cleaning Corp. *attorney(s) for*

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